

UT 06-3

Tax Type: Use Tax

Issue: Occasional Sales – Non-Retail Transactions (Exempt)

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

**ABC AVIATION  
GROUP, LLC,  
Taxpayer**

**No. 00-ST-0000  
IBT# 0000-0000  
NTL# 00 00000000000000  
00 00000000000000  
00 00000000000000**

**Ted Sherrod  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** John Alshuler, Special Assistant Attorney General, for the Illinois Department of Revenue; Brandt R. Madsen, Esq. of Madsen Farkas & Powen, LLC for ABC Aviation Group, LLC.

**Synopsis:**

This matter comes on for hearing pursuant to an initial review under 86 Ill. Admin. Code, ch. I, section 200.175 of Notices of Tax Liability number 00 00000000000000, 00 00000000000000 and number 00 00000000000000 issued to ABC Aviation Group, LLC (hereinafter referred to as “taxpayer” or “ABC”) by the Department of Revenue (“Department”) on December 2, 2004, January 10, 2005 and

February 17, 2005, respectively. A pre-trial order was entered on October 24, 2005, in which the parties stated the issue to be decided as “whether or not sales of the three aircraft at issue were exempt from taxation as occasional sales”, and “if these aircraft sales were taxable, whether the cost price of two of these aircraft, used to compute the tax due, has been properly determined.” Following the submission of evidence and a review of the record, it is recommended that this matter be decided in favor of the taxpayer. In support of this recommendation, I make the following findings of fact and conclusions of law.

**Findings of Fact:**

1. The Department’s *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of three forms entitled “Audit Correction and/or Determination of Tax Due” (“Correction of Return”) and corresponding Notices of Tax Liability number 00 00000000000000, number 00 00000000000000 and number 00 00000000000000 pertaining to the purchase of an L-39 C aircraft, serial number 000000, FAA Registration number 000000, an L-39 C aircraft, serial number 000000, FAA Registration number 000000 and a Poland Mig 17 (Lim-5) aircraft, serial number 000000, FAA Registration number 000000, and covering the periods January 29, 1999 and August 10, 2000, for use tax totaling \$76,035. Department Group Ex. 1, 2; Taxpayer Ex. 1(A)-1(D).
2. ABC Aviation Group, LLC (“ABC”) is a limited liability company commercially domiciled in Illinois and owned by John Doe. Tr. p. 23; Taxpayer Ex. 35.
3. MMM Aircraft Incorporated (“MMM”) is a Subchapter S corporation based in Anywhere, Illinois that was founded in 1990. Tr. pp. 23, 26. MMM is engaged in the

business of refurbishing ex-military aircraft and providing training programs for the Federal Aviation Administration (“FAA”). Tr. pp. 27-29. The company currently has 22 employees, a majority of whom are aircraft restoration specialists and licensed airframe and aircraft power plant mechanics. Tr. p. 27.

4. John Doe is the founder of MMM and owns two thirds of the corporation’s stock. Tr. p. 26.
5. On August 18, 1997, a duly authorized representative of the Ministry of Defense of the Republic signed an Aircraft Bill of Sale transferring title to an Aero L-39 C aircraft, serial number 000000 to ABC. Taxpayer Ex. 5. This Bill of Sale was recorded with the FAA on February 2, 2002. *Id.* At or about the time of the execution of this Bill of Sale, the taxpayer received a certification from a duly authorized official of the Ministry of Transport and Communication of the Republic, dated March 23, 1997, that this aircraft was not registered in the Civil Aircraft Register of the Republic. Taxpayer Ex. 6.<sup>1</sup>
6. On September 16, 1998, a duly authorized representative of the Ministry of Defense of the Republic executed an Aircraft Bill of Sale transferring title to an Aero L-39 C aircraft, serial number 000000 to ABC. Taxpayer Ex. 16. The FAA recorded this Bill of Sale on February 2, 1999. *Id.* At or about the time of the execution of this Bill of Sale, the taxpayer received a certification from a duly authorized officer of the Ministry of Transport and Communication of the Republic dated April 9, 1998 that this aircraft was not registered in the Civil Aircraft Register of the Republic. Taxpayer Ex. 17.

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<sup>1</sup> John Doe testified that this document must be obtained before the FAA will register an aircraft of foreign origin. Tr. p. 44 (“The FAA will not register an aircraft that is on the (civil) registry of another country.”).

7. Yuri D. XXXX, an ex-Soviet air force Mig pilot and instructor, and former Soviet Cosmonaut, assisted ABC in obtaining the L-39 C aircraft, serial number 000000 and the L-39 C aircraft, serial number 000000 by acting as a consultant and intermediary with the Russian government on ABC's behalf. Tr. pp. 33-41. Mr. Smith, an aerospace engineer and registered importer with the State Department, also acted as a consultant to ABC in obtaining these aircraft, principally by assisting in securing permission from the Bureau of Alcohol, Tobacco and Firearms to import these aircraft into the United States.<sup>2</sup> Tr. pp. 39-42.
8. Payment for both of the L-39 C aircraft acquired by ABC was made by wire transfer to the bank account of Soviet Technoport, a foreign trade company. Tr. pp. 45, 46. The initial wire transfer, in the amount of \$50,000, was made on December 10, 1998. *Id.*; Taxpayer Ex. 22. The following day, two additional wire transfers in the amount of \$80,000 each, were made. Tr. p. 47; Taxpayer Ex. 22.
9. The aggregate purchase price of the two L-39 C aircraft acquired by the taxpayer was \$220,000. Tr. pp. 48, 50.
10. Both L-39 C aircraft were delivered in shipping crates and in a disassembled state. Tr. pp. 53, 54. Each of these aircraft required over 1800 hours of labor to reassemble. Tr. p. 57. ABC subsequently sold one of these aircraft for an amount not exceeding \$375,000. Tr. p. 61; Taxpayer Ex. 23.
11. At the request of John Doe, ZZZ Reports, Inc. ("ZZZ"), which has been engaged in the business of searching records to determine the title to aircraft for over 25 years

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<sup>2</sup> John Doe testified that ex-military aircraft couldn't be imported into the United States until an importer registered with the State Department secures approval to do so from the Bureau of Alcohol, Tobacco and Firearms. Tr. pp. 40, 41. Smith is registered with the State Department, and filed the necessary forms required to obtain permission to import the two L-39 C aircraft obtained by ABC. *Id.*

(Taxpayer Ex. 1), searched the records of the FAA to determine the ownership history of the two L-39 C aircraft acquired by ABC. Taxpayer Ex. 1(A)-(C). On December 30, 2005, ZZZ issued a report showing that title to each of these aircraft was held by the Department of Transportation, Ministry of Defense of the Republic immediately before being transferred to ABC. *Id.*

**12.** On May 6, 1995, Mr. Jones (“Jones”) was issued a Certificate of Air Registration registering his ownership of a Poland Mig 17 (Lim. 5) aircraft, serial number 000000, U.S. Registration number 00000. Taxpayer Ex. 30. Jones, an American Airlines pilot, used this aircraft in his part-time vocation as an air show performer. Tr. pp. 88, 89.

**13.** On August 10, 2000, Jones executed an Aircraft Bill of Sale transferring title to the aforementioned Mig 17 aircraft to ABC, and the FAA recorded this Bill of Sale on that date. Taxpayer Ex. 29. No entry was made on the line entitled “DEALER CERTIFICATE NUMBER” on this form. *Id.* A contract dated July 19, 2000 entered into between Jones and ABC indicates that ABC purchased this aircraft from Jones for \$75,000. Taxpayer Ex. 35. This aircraft was subsequently sold to XXX LLC on October 1, 2001. Taxpayer Ex. 31.

**14.** ZZZ searched the records of the FAA to determine the ownership history of the Mig 17 aircraft discussed above. On January 3, 2006, it issued a report showing that Jones held title to this aircraft immediately before being transferred to ABC. Taxpayer Ex. 1(D).

### **Conclusions of Law:**

The issue in this case is whether the taxpayer's purchase of three aircraft in 1997, 1998 and 2000 qualifies for the occasional sale exemption set out in statutory provisions of the Illinois Use Tax Act ("UTA"), 35 **ILCS** 105/1 *et seq.* Illinois imposes a tax on the privilege of using tangible personal property purchased at retail from a retailer. 35 **ILCS** 105/3. An exception to this tax is provided when the purchase is made from an individual or entity that only engages in isolated or occasional sales of such property. 35 **ILCS** 105/2. This exception is available when the selling individual does not hold himself out as being engaged or does not habitually engage in selling such tangible personal property at retail. *Id.*

The taxpayer argues that the purchase of the three aircraft at issue is covered by the above exception to the use tax. The Department has established its *prima facie* case that the taxpayer is subject to the Illinois use tax by submitting Notices of Tax Liability and each corresponding Correction of Return into the record. Section 12 of the UTA (35 **ILCS** 105/12) incorporates by reference Section 4 of the Retailers' Occupation Tax Act (35 **ILCS** 120/4), which provides in pertinent part as follows:

As soon as practicable after the return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information...any return so corrected by the Department shall be *prima facie* correct and shall be *prima facie* evidence of the correctness of the amount of tax due, as shown therein.

Proof of such correction by the Department may be made at any hearing before the Department...and shall be *prima facie* proof of the correctness of the amount of tax due, as shown therein.

Pursuant to the foregoing, once proof of the Department's correction of the taxpayer's return is admitted into evidence, the amount of tax and penalty established

thereby is deemed *prima facie* true and correct. The Department having established its case, the burden shifted to the taxpayer to overcome it by producing competent evidence identified with its books and records. Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1<sup>st</sup> Dist. 1978), Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). Even if the taxpayer produces sufficient evidence to overcome the *prima facie* case, a taxpayer claiming to be exempt from tax has the burden of proving by clear and conclusive evidence that it is entitled to such an exemption. Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305 (1976).

The taxpayer argues that it should not be considered a retail purchaser of the three aircraft in controversy under Illinois law. In support of this position, the taxpayer has offered evidence and testimony indicating that the taxpayer acquired two of the three aircraft, the Aero L-39 C airplanes at issue, from the Ministry of Defense of the Republic, and that it acquired the third aircraft, the Mig 17 at issue, from James Jones, an American Airlines pilot and part-time air show performer. It contends that neither the Republic nor Jones was a registered aircraft dealer.

The record indicates that on August 18, 1997, ABC purchased an L-39 C aircraft, serial number 000000, from the Ministry of Defense of the Republic. Taxpayer Ex. 5. This transaction is documented by a Bill of Sale executed by an authorized representative of the Ministry of Defense of the Republic and recorded by the FAA on February 2, 2002. *Id.*

On September 16, 1998, ABC purchased an L-39 C aircraft, serial number 533526, from the Ministry of Defense of the Republic. Taxpayer Ex. 16. This transaction is documented by a Bill of Sale executed by an authorized representative of

the Ministry of Defense of the Republic and recorded by the FAA on February 2, 1999. Id.

On August 10, 2000, ABC purchased a Mig 17 aircraft, serial number 1C1020, from James Jones, an American Airlines pilot and part-time air show performer. Tr. pp. 88, 89; Taxpayer Ex. 29. This transaction is documented by a Bill of Sale executed by James Jones and recorded by the FAA on August 10, 2000. Taxpayer Ex. 29.

At the request of John Doe, owner of ABC, ZZZ Reports, Inc. (“ZZZ”), a company engaged in the business of searching records to determine the title to aircraft, searched the records of the FAA to determine the history of the two L-39 C aircraft acquired by ABC. Taxpayer Ex. 1(A)-(D). On December 30, 2005, ZZZ issued its report showing that title to both of the L-39 C aircraft acquired by ABC during 1997 and 1998 was held by the Ministry of Defense of the Republic immediately before title to these aircraft was transferred to the taxpayer. Id. On January 6, 2006, ZZZ issued a report showing that James Jones held title to the Mig 17 aircraft acquired by ABC in 2000 immediately before being transferred to ABC. Id.

In sum, all of the evidence regarding the sale of the three aircraft at issue in this case, including copies of the aircraft bills of sale from the Ministry of Defense of the Republic and from Jones, which have been registered with the FAA, indicate that ABC acquired the L-39 C aircraft at issue from the Ministry of Defense of the Republic, and the Mig 17 aircraft from Jones. Moreover, title searches conducted by ZZZ Reports, Inc., a company engaged in providing aircraft title searches for over 25 years, indicate that the Ministry of Defense of the Republic and Jones held title to the aircraft at all times subsequent to their acquisition until they were sold to the taxpayer. The documentary



evidence included in the record contains no evidence that either the Republic or Jones were an aircraft dealer.<sup>3</sup>

The Illinois use tax is imposed “upon the privilege of using in this State tangible personal property purchased at retail from a retailer”. 35 **ILCS** 105/3. Section 2 of the UTA (35 **ILCS** 105/2) provides that a person who is only engaged in the “isolated or occasional sale of tangible personal property at retail” and “who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail” is not a “retailer” for purposes of the UTA. See also 86 Ill. Admin. Code, ch. I, Sec. 150.101. Accordingly, sales by such persons are not subject to the Illinois use tax. Trans-Air Corp. v. Department of Revenue, 86 Ill. App. 3d 750, 752 (2nd Dist. 1980) (“It seems clear from the statutory definitions as amplified by the Department of Revenue’s Rules, that in order for the use tax to apply to the use of a particular piece of tangible personal property, that property must have been purchased at retail from a retailer”).

The evidence summarized above, which is not contested by the Department, indicates that the taxpayer acquired the aircraft from either the Republic or Jones, neither of whom was a registered aircraft dealer. There is no evidence in the record indicating that either the Republic or Jones was habitually engaged in the sale of aircraft, or held themselves out as being engaged in this business or that either of these persons was in any way a “retailer” as this term is defined in Section 2 of the UTA (35 **ILCS** 105/2). Since it appears from the record that neither the Republic nor Jones, the

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<sup>3</sup> While the Department tendered a document purporting to show that Jones was an aircraft dealer (Tr. p. 105), this document was never admitted into evidence and is not part of the record in these proceedings. Moreover, no entry indicating Jones’s status as a dealer was made in the space provided for this information on the Bill of Sale conveying the Mig 17 aircraft to ABC. Taxpayer Ex. 29.

sellers of the aircraft in question, were aircraft retailers, the use tax does not reach this property because it was not purchased “at retail from a retailer.” Trans-Air Corp., *supra*. Accordingly, the record persuasively supports a finding that the taxpayer has overcome the Department’s *prima facie* case and proven by clear and conclusive evidence that it is entitled to the exemption on the purchase of these aircraft that it claims.

With respect to the purchase of the two L-39 C aircraft at issue, The Department argues that the purchase of these aircraft, while in substance purchases from the Republic, were in form purchases either from Smith or XXX, a foreign trade company, persons that acted as intermediaries in facilitating these transactions. This position is apparently based on the auditor’s undocumented assertion in the summary of his audit findings that “taxpayer cannot purchase directly from the Russian government [.]” Department Group Ex. 2, Audit Comments. It argues that, in the absence of additional documentation, such possibilities cannot be ruled out. Tr. p. 136. However, I find that the documents contained in the record, consisting of bills of sale signed by both the buyer and seller of each of the aircraft at issue, and the results of title searches to establish the chain of ownership of each of these aircraft, along with corroborating testimony, constitute sufficient evidence to rebut the Department’s *prima facie* case. Masini, *supra*; Copilevitz, *supra*. The burden thus shifted to the Department to prove its claims regarding the Department’s theory by competent evidence. Novicki v. Department of Revenue, 373 Ill. 342 (1940). The Department has failed to do so. Accordingly, I find that the Department’s determination that the three aircraft at issue in this case were purchased at retail from a retailer has been successfully rebutted.

**WHEREFORE**, for the reasons stated above, it is my recommendation that Notices of Tax Liability number 0000000000000000, number 0000000000000000 and number 0000000000000000 be cancelled.

Ted Sherrod  
Administrative Law Judge

Date: April 10, 2006